

April 27, 2023

**National FOIA Office
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2310A)
Washington, DC 20460**

Submitted via FOIAonline.

**Freedom of Information Act (FOIA) and Fee Waiver Request Regarding
EPA and the Contingency Measures Guidance**

To Whom It May Concern:

The Central California Environmental Justice Network (“CCEJN”) submits this request for records under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, 7 C.F.R. § 1.1 *et seq.*, 7 C.F.R. Subtitle B § 798.1 *et seq.* In accordance with those laws and regulations, please provide us with the following information from the U.S. Environmental Protection Agency within twenty working days (5 U.S.C. § 552(a)(6)(A)(1)):

1. **From July 1, 2020 to the date that EPA conducts its search, all records that discuss or describe:** the contingency measures guidance including, but not limited to, the draft contingency measures guidance posted on the EPA website¹ on March 17, 2023.
2. **From July 1, 2020 to the date that EPA conducts its search, all records that discuss or describe:** *Association of Irrigated Residents v. U.S. Environmental Protection Agency*, Case No. 19-71223 (9th Cir.)
3. **From July 1, 2020 to the date that EPA conducts its search, all records that discuss or describe:** California regulators and the contingency measures guidance including, but not limited to, the March 16, 2023 version of the draft contingency measures guidance filed by the California Air Resources Board in *Central California Environmental Justice Network v. Randolph*, No. 2-22-cv-01714-DJC-CKD. *See* Request for Judicial Notice in Support of State Defendants’ Opposition to Motion for Summary Judgment (Dkt. No. 30-1).
4. **From July 1, 2020 to the date that EPA conducts its search, all records that discuss or describe:** attainment contingency measures for the plan to attain the 1997 8-hour ozone standard in the San Joaquin Valley. *See* 40 C.F.R. § 52.220(396)(ii)(A)(2)(i); 77 Fed. Reg. 12652, 12672 (March 1, 2012).

For this request, the term “records” refers to, but is not limited to, any and all documents, correspondence (including, but not limited to, inter and/or intra-agency correspondence as well as correspondence with entities or individuals outside the federal government), emails, letters,

¹ <https://www.epa.gov/air-quality-implementation-plans/draft-contingency-measures-guidance> (last visited April 9, 2023).

notes, manuals, recordings, telephone records, voicemails, telephone notes, telephone logs, text messages, chat messages, minutes, memoranda, comments, files, presentations, consultations, opinions, assessments, evaluations, schedules, databases, and/or all other responsive records, in draft or final form. This is not meant to exclude any other records that, although not specially requested, are reasonably related to the subject matter of this request. Our request includes all documents that have ever been within EPA's custody or control, whether they exist in agency "working," investigative, retired, electronic mail, or other files currently or at any other time.

The term "contingency measures" refers to contingency measures for failure to make reasonable further progress and contingency measures for failure to attain, as required by Clean Air Act sections 172(c)(9) and 182(c)(9), 42 U.S.C. §§ 7502(c)(9), 7511a(c)(9).

The term "contingency measures guidance" refers to the EPA's interpretation of the applicable requirements for contingency measures.

The term "California regulators" includes the California Air Resources Board and the San Joaquin Valley Unified Air Pollution Control District.

Consistent with the FOIA, Requestors ask that these materials be produced in an "unredacted" form, meaning that we are seeking full disclosure of all information in the requested records. If you determine that you can disclose only some of the information contained in a record that falls within the scope of this request, please provide us with a copy of the record with only the information that you have determined to be properly treated as confidential redacted.

Under FOIA, you are obligated to provide records in a readily accessible electronic format and in the format requested. *See, e.g.*, 5 U.S.C. § 552(a)(3)(B) ("In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format."). "Readily accessible" means text-searchable and OCR-formatted. *See* 5 U.S.C. § 552(a)(3)(B). Pursuant to this requirement, we hereby request that you produce all records in an electronic format and in their native file formats. If you produce files in .PDF format, then please omit any "portfolios" or "embedded files." Portfolios and embedded files within files are not readily accessible. Please do not provide the records in a single, or "batched," .PDF file.

If any information requested herein was, but is no longer, in EPA's possession or subject to its control, state whether it (a) is missing or lost, (b) has been destroyed, (c) has been transferred voluntarily or involuntarily to others, or (d) has otherwise been disposed of and in each instance, explain the authorization for and circumstances surrounding the disposition of the information and state the date (or approximate date) of its loss. 5 U.S.C. § 552(b) and 7 C.F.R. § 1.11, 1.19.

If you claim that any of the requested records are exempt from mandatory disclosure in whole or in part, we respectfully request that you:

- 1) Provide an index of all documents containing the requested information but that have been withheld or redacted, in whole or in part, reflecting the date, author, addressee, number of pages, and subject matter of such documents;
- 2) State all exemption(s) you deem to be applicable for each document;
- 3) State with particularity the reason each such exemption is applicable to each document;
- 4) Examine each document to determine if reasonably segregable non-exempt information exists which may be released after redacting information deemed to be exempt; and
- 5) Exercise your discretion to release such records notwithstanding the availability of a basis for withholding. Please separately state your reasons for not invoking your discretionary powers to release the requested documents in the public interest. Such statements will be helpful in deciding whether to appeal an adverse determination and in formulating arguments in the event an appeal is taken.

REQUEST FOR FEE WAIVER

Pursuant to FOIA's fee waiver provision, 5 U.S.C. § 552(a)(4)(A)(iii), CCEJN asks that EPA waive all fees in connection with procurement of the requested records. In deciding whether the fee waiver criteria are satisfied, CCEJN reminds EPA that FOIA is inclined toward disclosure, and that the fee waiver amendments were enacted to allow further disclosure to nonprofit, public interest organizations. *See, e.g.*, 132 Cong. Rec. S.14270-01 (statement of Sen. Leahy) ("[A]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information.").

Indeed, FOIA's fee waiver was designed specifically to allow public interest groups, such as CCEJN, access to government documents without the payment of fees. The courts have stated that the statute "is to be liberally construed in favor of waivers for noncommercial requesters." *See Judicial Watch v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (stating "that Congress amended FOIA to ensure that it is 'liberally construed in favor of waivers for noncommercial requesters'"). As explained below, this request meets the six-factor test for a fee waiver established in FOIA and the USDA's accompanying regulations. *See* 7 C.F.R. Appendix A to Subpart A of Part 1 § 6(a)(1)(i) – (vi).

If EPA would like additional information on the issue of the fee waiver, please do not hesitate to contact Nayamin Martinez and Brent Newell (contact information below).

I. The present disclosure is in the public interest because it will significantly contribute to public understanding of the operations or activities of government.

The requested disclosure will significantly contribute to public understanding of the operations or activities of the government. 5 U.S.C. § 552(a)(4)(A)(iii).

(i) The subject of the disclosure concerns “the operations and activities of the government.”

The subject matter of this request concerns the operations and activities of EPA related to contingency measures for California and the San Joaquin Valley air basin. This request asks for records that discuss or describe contingency measures, the contingency measures guidance, the draft contingency measures guidance posted on the EPA website for public comment on March 17, 2023, the activities of California regulators with respect to contingency measures, and all interactions between the EPA and the California regulators regarding contingency measures and the draft contingency measures guidance.

The response to this FOIA request will provide CCEJN and the public with crucial insight into the EPA implementation of the Clean Air Act with respect to contingency measures, and the manner in which it developed the draft contingency measures guidance in conjunction with California regulators. A federal agency’s actions prior to and following the *Association of Irrigated Residents* decision and related contingency measures issues are specific and identifiable activities of the government, and in this case it is an executive branch agency. *Judicial Watch*, 326 F.3d at 1313 (“[R]easonable specificity is all that FOIA requires with regard to this factor”) (internal quotations omitted). Thus, CCEJN meets this factor.

(ii-iii) The disclosure is “likely to contribute” to the “public understanding” of government operations or activities.

The requested records will provide the public with a better understanding of the nature of contingency measures, the contingency measures guidance and the manner in which EPA interacted with California regulators in developing the draft contingency measures guidance. The requested records will allow CCEJN to convey to the public information about the consistent history of failure to attain national ambient air quality standards in the San Joaquin Valley and EPA’s weakening of the Clean Air Act contingency measures requirements – under pressure from California regulators – that would apply to inevitable failures to attain the standards in the future.

Currently, the public understanding of contingency measures has been severely limited due to the complexity of the Clean Air Act, the way the California regulators have framed a narrative around contingency measures after the *Association of Irrigated Residents* decision, and EPA’s failure to hold California regulators accountable for failing to adopt adequate contingency measures. CCEJN has played a significant role to date in advocating for adequate contingency measures both before the Board and the District during public workshops and board hearings, and by enforcing the commitment at 40 C.F.R. § 52.220(396)(ii)(A)(2)(i) after the EPA failed to do so.

Proper and timely releases of non-exempt records will shed light on EPA’s contingency measures guidance and the draft contingency measures guidance proposed on March 17, 2023. It will shed light on the manner in which the California Air Resources Board obtained an advance draft of the draft contingency measures guidance with a date stamp on the document header of March 16, 2023 or any other versions of the draft guidance or other coordination between EPA and California regulators. The California regulators have complained during public workshops

and board meetings about the stringency of contingency measures and called on EPA to weaken its interpretation to reduce the amount of emissions reductions the California regulators must provide to the public upon a failure to attain the standards or make RFP. The draft guidance appears to deliver exactly what California regulators sought. Moreover, it appears that EPA has had extensive conversations with the Board and the District regarding the draft contingency measures guidance based on California regulators representations during public meetings and in an memorandum from staff to Board Members of the California Air Resources Board dated January 24, 2023.

CCEJN further notes that public oversight of agency action is a vital component in our democratic system and is the bedrock upon which FOIA stands; the public therefore has an equally vital interest in understanding *how* agencies charged with enforcing the Clean Air Act do so. Simultaneously, the information sought will help CCEJN fulfill core parts of its own mission by gaining valuable insight into how California regulators have interacted with the EPA for relief from current contingency measures requirements, and how EPA has acquiesced to such lobbying.

(iv) The disclosure’s contribution to public understanding of government operations or activities will be “significant.”

In determining whether the disclosure of requested information will contribute significantly to public understanding, a guiding test is “whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject.” *Carney v. U.S. Dept. of Justice*, 19 F.3d 807, 815 (2d Cir. 1994). Federal courts have found that dissemination to 2,500 people through a newsletter is sufficient to meet the “reasonably broad audience” factor. *Forest Guardians v. U.S. Dep’t of Interior*, 416 F.3d 1173, 1180 (10th Cir. 2005). Moreover, they have found that the proven ability to digest and disseminate highly technical information, as demonstrated by past analysis and dissemination, merits giving nonprofit organizations fee waivers. *See W. Watersheds Project v. Brown*, 318 F. Supp. 2d 1036, 1040 (D. Idaho 2004).

CCEJN’s activities meet and surpass these standards. As mentioned previously, CCEJN has a history of advocating for strong contingency measures. CCEJN has almost 23 years of advocacy history focused on the air quality in the San Joaquin Valley and appropriate government action to address the air pollution crisis. CCEJN also works with the media to disseminate information about air quality, which has led to articles published in, among other publications, CalMatters, the Fresno Bee, KQED, Capital Public Radio, Los Angeles Times, The Bakersfield Californian, The Desert Sun, The Sacramento Bee, US News, and the New York Times. These articles have been about air quality, wildfire smoke, farmworker health and safety, access to clean and affordable drinking water, oil and gas, and confined animal feedlots. CCEJN maintains an active social media presence, and has shared information directly with the public on its Twitter platform @CCEJN. CCEJN will use its website, email lists, press releases, and media coverage of the contingency measures issue to disseminate information about contingency measure in ways that are easy to understand, significantly contributing to the public’s understanding of government activities and other issues of great public concern.

(v-vi) No “commercial interest” exists because (vi) Requestors’ “primary interest” in disclosure is not commercial.

Fee waiver eligibility requires that the FOIA requester not make its request “primarily in [its] commercial interest[.]” 7 CFR 1, Subpart A, Appendix A, §6(a)(1)(vi).

A commercial interest is one that furthers a commercial, trade, or profit interest, as those terms are commonly understood. *See, e.g.*, The Freedom of Information Reform Act of 1986; Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 Fed. Reg. 10012, 10017–18 (Mar. 27, 1987). Such interests are absent from this request. CCEJN is a 501(c)(3) nonprofit organization. CCEJN has no commercial, trade, or profit interests in the records requested. CCEJN will not be paid for, or receive other commercial benefits from the publication or dissemination of the material requested. As explained in greater detail below, CCEJN’s “primary interest” in the requested material is to disseminate that information for the purpose of informing and educating the public.

Requestor CCCEJN was founded in 2000 with a mission to empower our communities and secure our children’s future by eliminating negative environmental impacts in low-income and communities of color in the Central Valley. To achieve this mission, CCEJN (1) works with community members and other stakeholders at the local, regional, state and federal level to identify environmental justice issues and develop sustainable solutions, (2) educates and empowers communities, especially focusing on rural areas, to advocate for themselves by providing them with technical assistance and resources, (3) promotes alternative methods for a safer environment, (4) encourage youth to be aware of and participate in environmental issues, and (5) serves as a hub for environmental activism in the Central Valley. CCEJN has a strong interest in information related to the EPA’s activities to implement the Clean Air Act and contingency measures.

As illustrated above, CCEJN’s “primary interest” is not “commercial.” Requestors fully intend to analyze and disseminate the disclosed information to educate the public for non-profit purposes. This is not a situation in which “the magnitude of any identified commercial interest to the requestor is sufficiently large in comparison with the public interest in disclosure that disclosure is primarily in the commercial interest of the requestor.” 7 CFR 1, Subpart A, Appendix A, §6(a)(1)(vi). Because disclosure of these records will significantly contribute to the public’s understanding of EPA’s operations and activities—and disclosure “is not primarily in the commercial interest of” Requestors—a fee waiver is therefore appropriate. 5 U.S.C. § 552(a)(4)(A)(iii).

If EPA does not waive fees, please notify and inform us of the basis for your decision. If fees are not waived, please also notify us of the anticipated cost of responding to this request so that we can determine in advance whether to incur those costs, and provide times at which the records will be available for inspection and any cost associated with conducting an inspection.

REPLYING TO THIS REQUEST

Please send all materials to Nayamin Martinez and Brent Newell at the contact information below. Please do not wait to assemble all documents that are responsive to this request before releasing information, but rather release them on a rolling basis. If the responsive records are voluminous, please contact Brent Newell to discuss the proper scope of the response. Finally, please do not hesitate to e-mail or call if questions arise.

Thank you for your prompt attention to our request.

Sincerely,

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